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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

YEVGENY SELIVANOV

Petitioner,

V.

XAVIER BECERRA, Attorney
General, State of California,
Respondent.

**PETITION FOR WRIT OF HABEAS
CORPUS UNDER 28 U.S.C. § 2254**

1 Petitioner Yevgeny (Eugene) Selivanov, by his counsel of record, petitions
2 this Court for a Writ of Habeas Corpus, and by this verified petition sets forth the
3 following facts and causes for issuance of the writ.

4
5 Dated: June 12, 2018

Respectfully submitted,

6
7 KENDALL, BRILL & KELLY, LLP

8 /s/Jeffrey H. Rutherford
9 Jeffrey H. Rutherford

10 CROWELL & MORING LLP

11 /s/Nimrod Haim Aviad
12 Nimrod Haim Aviad

13 Attorneys for Petitioner,
14 YEVEGENY SELIVANOV

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- Trial Exhibit 1:** Ivy Academia Charter Petition, October 2003
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Trial Exhibit 13: Select Board Agendas and Minutes
Trial Exhibit 17: American Express Charges Schedule
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INTRODUCTION

Yevgeny (Eugene) Selivanov is before this Court because the State of California has punished him for conduct that was not criminal under California's embezzlement law at the time he engaged in it, but rather was made criminal by the California Court of Appeal's novel and retroactive expansion of the otherwise narrow and precise definition of that law. This retroactive expansion of California's embezzlement law eliminated the required fair warning that a criminal statute must provide as to the conduct that it prohibits and thus violated Mr. Selivanov's right to due process under the Fifth and Fourteenth Amendments.

Bouie v. City of Columbia, 378 U.S. 347(1964); *United States v. Lanier*, 520 U. S. 259, 266 (1997).

Mr. Selivanov is also before this Court because his criminal sentence was increased beyond its statutory limits based on facts found to be true by the trial judge and not by the jury beyond a reasonable doubt as commanded by the Sixth and Fourteenth Amendments. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Alleyne v. United States*, 570 U.S. 99 (2013).

These constitutional violations entitle Mr. Selivanov to relief in this Court.

STATEMENT OF FACTS

A. The Entities Involved: Ivy Academia Charter School and Alternative Schools, Inc.

1. Ivy Academia Charter School was started by Mr. Selivanov and his wife Tatyana Berkovich to provide a quality public school education with an emphasis on entrepreneurship. [Ex. 1 at 3.] The original charter school application was submitted in October 2003. [*Id.* at 1.]

2. Ivy Academia opened its doors to students in September 2004. [4RT 1539; Ex. 73 at 11.]¹ Despite California's budget woes, Ivy Academia was able to

¹ The Reporter's Transcript (hereinafter, "RT") in this case consists of 22 volumes. The Clerk's Transcript (hereinafter, "CT") in this case consists of 27

offer: (1) small class sizes with a low student-to-teacher ratio; and, (2) academic enrichment classes such as music appreciation and foreign language instruction (Spanish, French, Mandarin and Russian) beginning in the first grade. [Ex. 2 at 1-6.] Ivy Academia petitioned for a renewed charter in July 2007. [4RT 1586, Ex. 2.] In June 2008, based on its successful first five years, Ivy Academia's petition for renewal was approved by LAUSD and its charter renewed for five more years. [4RT 1529-30; 15RT 4819, 4649.]

3. Ivy Academia was regularly audited by the Charter Schools Division of LAUSD, and those audits included site visits, interviews with staff, parents, management, and board members, with a focus on governance and fiscal management. [4RT 1424, 1526-27, 1630-33; 14RT 4690-91.]

4. For all years in question, Ivy Academia was also audited by two independent accounting firms—first, by Anderson, Satuloff, Machado and Mendelsohn, CPAs, and, later, by Vicenti, Lloyd, and Stutzman LLP. Both of these independent accounting firms were approved to be charter school auditors by the California State Controller. [4RT 1587-92.] These independent accounting firms prepared publicly available, annual audited financial statements for Ivy Academia. [See Ex. 73 (FY 2005 Statement); Ex. 202 (FY 2006 Statement); Ex. 205 (FY 2007 Statement), Ex. 74 (FY 2008 Statement); Ex. 250 (FY 2009 Statement); Ex. 251 (FY 2010 Statement).] The annual audits were mandatory. [4RT 1587-88.]

5. Alternative Schools, Inc. was the non-profit public benefit corporation that operated Ivy Academia, and the owner of the funds Mr. Selivanov supposedly embezzled. Alternative Schools, Inc. was established on May 11, 2004 (after the charter school petition was submitted to and approved by LAUSD) for the purpose of operating Ivy Academia. [Ex. 6.]

volumes. For the Court's convenience, petitioner attaches only the volumes cited to in this petition. Each cite to the record begins with the number of the volume to which the citation is made.

1 **B. The Charges Under Review**

2 **1. The American Express Card Expenditures**

3 6. During his tenure at Ivy Academia, Mr. Selivanov used an American
 4 Express credit card (“AMEX Card”) for expenses connected with Ivy Academia.
 5 [9RT 3051.] The prosecution challenged Ivy Academia’s payment of some of Mr.
 6 Selivanov’s AMEX Card charges as embezzlement (count 2). The gist of the
 7 prosecution’s claim was that Mr. Selivanov fraudulently appropriated Ivy
 8 Academia’s property when Ivy Academia paid American Express for certain
 9 purchases Mr. Selivanov made with the AMEX Card. In particular, the prosecution
 10 challenged Mr. Selivanov’s use of the AMEX Card to pay for business meals and
 11 teacher appreciation events between the years 2005 and 2010, which were then paid
 12 for by Ivy Academia.² [9RT 3053-54; Ex. 17 (highlighting in yellow amounts
 13 “disallowed”).]

14 7. To support its allegations regarding the AMEX Card, the prosecution
 15 called Connie Delos Santos, a financial analyst at LAUSD-OIG and a CPA.³ [9RT
 16 3022-23.] Ms. Delos Santos testified that she reviewed Ivy Academia’s records,
 17 including AMEX Card statements, vendor credit card receipts, and Ivy Academia
 18 expense reports, and created a compilation of all the AMEX Card charges from
 19 January 2005 to January 2010. [9RT 3047; Ex. 17.] She then highlighted in yellow
 20 each purchase she deemed to be an inappropriate use of Ivy Academia’s funds
 21 given the funds’ purported “public” nature. [9RT 3053-54; 10RT 3389-91.]

24 ² The issue at trial was not whether these were, in fact, business-related meals and
 25 teacher appreciation events, but whether Ivy Academia’s funds should have been
 26 used to pay for them.

27 ³ Ms. De Los Santos was a category “G” CPA. As such, she could not sign-off on
 28 audit reports. [11RT 3660.] Her experience auditing charter schools was limited to
 two schools, including Ivy Academia. [10RT 3391.]

1 8. Ms. Delos Santos testified as to which AMEX Card purchases were
 2 inappropriate based on certain pre-determined criteria that she had devised. Ms.
 3 Delos Santos inexplicably disallowed all meals charged by Mr. Selivanov to the
 4 AMEX Card, unless the meal accompanied a business meeting lasting more than
 5 five hours, or unless the meal was related to a conference taking place away from
 6 Los Angeles. [10RT 3437-38.] She also disallowed all teacher appreciation events
 7 charged to the AMEX Card unless the event had a specifically delineated
 8 professional development component. [11RT 3659-60.]

9 9. Ms. Delos Santos could not cite to any particular rule, regulation, or
 10 statute that informed her decision to disallow these business-related meals and
 11 teacher appreciation events,⁴ but noted that she did so because, in her opinion, the
 12 funds used to pay for the meals were “public funds,” and those, again, in her
 13 opinion, could not be used to pay for business-related meals and teacher
 14 appreciation events outside of the restrictions she had set. [*Id.*; 10RT 3414-20.]

15 10. The prosecution also presented testimony from Marina Pilyavskaya—
 16 Ivy Academia’s bookkeeper. [5RT 1815.] Ms. Pilyavskaya explained Ivy
 17 Academia’s process for review and approval of the AMEX Card expenses. She
 18 testified that when she received the monthly AMEX Card statement from American
 19 Express, she typed-up an itemized expense report according to the purchases
 20 reflected on the AMEX Card statement. She then asked Mr. Selivanov for his
 21 credit card receipts. [5RT 1852-53; 1937-38.] Once she received the receipts from
 22 Mr. Selivanov, Ms. Pilyavskaya attached them to the itemized expense report that
 23 she had typed up and submitted them both to Ivy Academia’s board member (and
 24 board treasurer) Arthur Sarkisian, for approval. [5RT 1853.] Only once the

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 26
 27 ⁴ Accordingly, it was undisputed at trial that no document existed that put Mr.
 28 Selivanov on notice as to Ms. De Los Santos’ arbitrary restrictions.

1 expenses were approved by Mr. Sarkisian was the check to American Express
2 issued. [5RT 1929.]

3 11. Ms. Pilyavskaya also testified that, as part of Ivy Academia's
4 mandatory annual audit, Ivy Academia's independent auditors requested and
5 received all documentation related to the American Express charges. Ms.
6 Pilyavskaya provided the independent auditors with all the AMEX Card statements
7 and the associated purchase receipts, as well as other documents the auditors
8 requested, including board of directors' minutes, contracts, bank statements, payroll
9 documents, invoices, and checks. [5RT 1930-34.] Ms. Pilyavskaya testified that
10 she never kept anything from the independent auditors, nor was she ever instructed
11 to do so by Mr. Selivanov. [*Id.*]

12 12. Finally, the jury heard testimony from Aaron Earleywine, a charter
13 school financial overseer with the Charter Schools Division of LAUSD, who was
14 responsible for the financial oversight of Ivy Academia, [4RT 1421] and from
15 Patricia Smith, a representative of the Los Angeles County Office of Education's
16 finance department. [4RT 1671.]

17 13. Mr. Earleywine testified that throughout the time he was responsible
18 for Ivy Academia's financial oversight, the school never received a rating lower
19 than proficient for its financial operations—the second highest available rating.
20 [4RT 1632.] Mr. Earleywine also testified that he was aware, as early as 2006, that
21 the AMEX Card was used to pay for various meals. [4RT 1583.] Nonetheless, Mr.
22 Earleywine never informed Mr. Selivanov that there was any concern within
23 LAUSD regarding these AMEX Card expenditures, and never told Mr. Selivanov
24 to stop making them, even when Ivy Academia's charter was up for renewal. [4RT
25 1584, 1587.]

26 14. Both Earleywine and Smith were asked whether the expenditures at
27 issue were permissible. Both testified that there is no blanket prohibition on these
28 types of expenditures and that their propriety would depend on their circumstances.

1 [See, e.g., 4RT 1610-11 (Eairleywine); 4RT 1694-1697 (Smith).] Both stated,
 2 however, that LAUSD and the Los Angeles County Office of Education generally
 3 did not classify “activities for the pleasure of faculty and teachers and staff such as
 4 bowling,” and “after hours dinners off campus” as expenses that charter schools and
 5 their operators were authorized to make. *See People v. Selivanov*, 5 Cal. App. 5th
 6 726, 751 (Ct. App. 2016), *as modified on denial of reh’g* (Dec. 13, 2016), *review denied*
 7 (Mar. 15, 2017).

8 **2. The Capital Improvement Loan and Its Repayment**

9 15. In 2006, Ivy Academia borrowed \$600,000 from Western Commercial
 10 Bank to pay for tenant improvements at its 6051 De Soto campus (the “Western
 11 Commercial Bank Loan”). [Ex. 31; Ex. 13 at 46.] That loan was personally
 12 guaranteed by Mr. Selivanov—at no additional cost to Ivy Academia. [Ex. 31 at 11-
 13 14.]

14 16. The De Soto facility was originally made available to Ivy Academia
 15 for use through the help of AJFK LLC (and Mr. Selivanov and Ms. Berkovich) as
 16 the facility’s landlord was not willing to lease the facility directly to Ivy Academia,
 17 given that Ivy Academia had no financial track record. [Ex. 13 at 45; 8RT 2868-
 18 69.] AJFK LLC (Mr. Selivanov and Ms. Berkovich’s private company) therefore
 19 leased the facility for ten years, and Mr. Selivanov and Ms. Berkovich (as part of
 20 AJFK LLC’s lease) personally guaranteed that the rent would be paid. [Ex. 25.]
 21 The lease was *not* between the landlord and Ivy Academia. In fact, at no time was
 22 Ivy Academia in a direct lessee-lessor relationship with the landlord [8RT 2861,
 23 2869.]

24 17. From 2004 until 2007, AJFK LLC assigned the De Soto lease to Ivy
 25 Academia “at cost,” with no additional compensation for the risk that AJFK LCC
 26
 27
 28

1 (and, based on their guarantee, Mr. Selivanov and Ms. Berkovich) undertook.⁵ [Ex.
 2 26; Ex. 13 at 45.]

3 18. On October 2, 2008, Ivy Academia's board of directors discussed and
 4 voted on a new lease and loan arrangement that, among other things, changed the
 5 payments for the Western Commercial Bank Loan and the lease. Under the new
 6 lease and loan arrangement, eGeneration (previously AJFK LLC), the company
 7 jointly owned by Mr. Selivanov and Ms. Berkovich, assumed the Western
 8 Commercial Bank Loan in the amount of \$520,000. At the same time, Ivy
 9 Academia's lease payments to eGeneration for use of the De Soto facility were set
 10 at 90% of market, or \$43,870.05 a month.⁶ [Ex. 13 at 46.] In its discussion, the
 11 board of directors discussed the benefit of these changes to Ivy Academia,
 12 including the fact that it would allow the school to strengthen its balance sheet. [*Id.*]

13 19. Neither Mr. Selivanov nor Ms. Berkovich participated in the vote or
 14 the preceding board of directors' discussion regarding the lease and loan
 15 arrangement. [*Id.*] After the transaction was approved by the board of directors, a
 16 contract to the same effect was drafted and signed by the relevant parties—
 17 Alternative Schools, Inc. (the operator of Ivy Academia) and eGeneration (Mr.
 18 Selivanov and Ms. Berkovich's private company). [Ex. 13 at 47.] The agreement,
 19 entitled "Assignment Assumption of Lease," was made effective retroactively, per
 20 the board of directors' resolution, to July 1, 2007. [Ex. 13 at 46.]

21

22 ⁵ This type of "sub-lease" arrangement is common for charter schools in
 23 California, as many new charter schools cannot lease facilities themselves, and
 24 resort to dependence on their founders' financial wherewithal for this purpose.
 25 [14RT 4663-64.]

26 ⁶ The De Soto facility's market rent value was submitted to the board of directors
 27 of Ivy Academia through the broker's opinion of value of Lee & Associates, [Ex.
 28 13 at pp. 49-50], and confirmed at trial through the testimony of Robert Gutzman, a
 licensed real-estate appraiser with the firm CB Richard Ellis. [18RT 5813; Ex. 313
 at 2-3.]

1 20. Under the Assignment Assumption of Lease agreement, Ivy Academia
2 (the assignee) agreed to make monthly payments to eGeneration (the assignor)—or
3 its designee—in the amount of \$43,870.05 for the use of the De Soto facility and
4 the lease guarantees. [Ex. 13 at 47.] In reality, Ivy Academia did not pay
5 \$43,870.05 to eGeneration. Rather, Ivy Academia paid eGeneration’s designees:
6 making a rent payment each month to eGeneration’s landlord⁷ and making a loan
7 payment each month to Western Commercial Bank. [8RT 2720-21; 17RT 5522-
8 23.]

9 21. Accordingly, Ivy Academia’s payments to the landlord and to Western
10 Commercial Bank were recorded in the school’s QuickBooks as “rent” payments.⁸
11 [5RT 1947-48; Ex. 214.⁹] In other words, Ivy Academia continued to pay Western
12 Commercial Bank for the Loan (as it did before), but each of those payments was
13 deducted from Ivy Academia’s lease liability to eGeneration for use of the De Soto
14 facility. [12RT 3916, 3923-24; 8RT 2727-28; 17RT 5525.]¹⁰ Ivy Academia’s
15 continued payments to Western Commercial Bank were challenged by the
16 prosecution as embezzlement under count 40.¹¹

⁷ J&N Amoroso was not the original owner of the property, but held it under a lease with the property's master landlord, A.J. Levine. [8RT 2855; Ex. 24.]

⁸ No allegation was made that Ivy Academia's books contained amounts that were incorrect.

⁹ Ivy Academia's payments to J&N Amoroso were recorded in the QuickBooks as payments to Big Valley Self-Storage. [Ex. 214.] Big Valley Self-Storage was a division of J&N Amoroso. [7RT 2413.]

¹⁰ Ivy Academia's payments to J&N Amoroso and Western Commercial Bank did not total \$43,870.05. The remaining lease liability to eGeneration was not paid to eGeneration; instead, it was booked as debt on Ivy Academia's books. [12RT 3916.]

¹¹ The People also charged Mr. Selivanov with four counts of embezzlement and two related money laundering counts (Counts 8, 19, 22, 23, 25, and 26) for transferring money out of Ivy Academia's account against money owed to Mr. Selivanov and eGeneration. These charges also depended on the assumption that

1 **C. California Charter School System**

2 **1. The Charter School Act of 1992**

3 22. The Charter Schools Act was enacted, in part, to “disrupt
 4 entrenchment” of negative traits in the bureaucracy of the California public school
 5 system, *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1130 (1999); to give
 6 charter schools “substantial freedom to achieve academic results free of
 7 interference by the public educational bureaucracy.” *Wells v. One2One Learning*
 8 *Found.*, 39 Cal. 4th 1164, 1201 (2006).

9 23. California Education Code section 47610, commonly referred to as the
 10 “Mega-Waiver” provision, establishes the basic principle that permits charter
 11 schools to operate free of the rules that bind traditional public schools—including
 12 rules regarding the expenditure of funds—so long as the charter school meets or
 13 exceeds academic standards set out in Education Code section 47607(b) and/or its
 14 charter petition. Cal. Educ. Code §§ 47607(b), 47610. California Education Code
 15 section 47610 states: “A charter school shall comply with this part [Education Code
 16 Part 26.8 (the CSA)] and all of the provisions set forth in its charter, but is
 17 otherwise exempt from the laws governing school districts.” Cal. Educ. Code §
 18 47610 (emphasis added).

19 **2. The Power to Determine How Charter School Funds are
 20 Spent**

21 24. Ivy Academia, like all California charter schools, receives funds from
 22 public sources. However, the expenditure of those funds is governed not by the
 23 strictures of a traditional public school district, but by the dictates of a charter
 24 school’s charter and governing body—its board of directors. This is an extension
 25 of the performance-based principle that underlies the Charter Schools Act. “The

26 27 the Lease/Loan agreement was not permitted even though it was considered and
 28 approved by the school’s governing board. The requested review by this Court
 would therefore implicate these charges as well.

autonomy, and independent responsibility, of charter school operators extend, in considerable degree, to financial matters.” *Wells*, 39 Cal. 4th at 1201. The intent is to challenge charter school leaders to find innovative practices and a more effective use of public funds to “provide vigorous competition within the public school system to stimulate continual improvements in all public schools.” Cal. Educ. Code § 47601(g).

7 25. Two types of grants dominated the public funds Ivy Academia
8 received during the relevant years—general purpose grants, Cal. Educ. Code §
9 47633(c), which “may be used for any public school purpose determined by the
10 governing body of the charter school” Cal. Educ. Code § 47633(c)); and categorical
11 block grants, Cal. Educ. Code § 47634.1(h), which may be used “for any purpose
12 determined by the governing body of the charter school.” Cal. Educ. Code §
13 47634.1(h). By law, therefore, it was the governing body of Ivy Academia that was
14 authorized to spend these public funds, without regard to the restrictions generated
15 by the rules, policies, and laws governing traditional public schools.

PROCEDURAL HISTORY AND JURISDICTIONAL ALLEGATIONS

A. Conviction on which petition is based

20 26. Offenses involved: Embezzlement pursuant to California Penal Code
21 section 504 (six counts), Money Laundering pursuant to California Penal Code
22 section 186.10(a) (two counts), and violation of California Revenue and Taxation
23 Code section 19705(a) (ten counts).

24 27. For each of the counts of convictions pursuant to California Penal
25 Code section 504, the trial court (but not the jury) found that funds embezzled were
26 public funds, pursuant to California Penal Code section 514.

27 || 28. Case number: BA372244.

28 || 29. Date of conviction: April 5, 2013.

1 30. Date of sentence: October 4, 2013.

2 31. Total length of sentence: four years, eight months.

3 32. Plea: not guilty.

4 33. Kind of trial: jury.

5 **B. Appeal to the California Court of Appeal**

6 34. Mr. Selivanov filed a timely notice of appeal on November 15, 2013,
7 and filed an amended notice of appeal on February 10, 2014.

8 35. Assigned case number: B252894.

9 36. Mr. Selivanov challenged his conviction on the following grounds:
10 insufficient substantial evidence; jury instruction errors; admission of hearsay
11 evidence without a proper foundation; abuse of discretion related to victim
12 restitution; *Apprendi* error.

13 37. Date of decision: the California Court of Appeal issued its published
14 opinion on November 17, 2016. *See People v. Selivanov*, 5 Cal. App. 5th 726 (Ct.
15 App. 2016), *as modified on denial of reh’g* (Dec. 13, 2016).¹²

16 38. Result: conviction affirmed.

17 **C. Petition for Review in the California Supreme Court**

18 39. Mr. Selivanov filed a timely petition for review in the California
19 Supreme Court and a request for an order to de-publish the opinion on December
20 27, 2016.

21 40. Assigned case number: S239154.

22 41. Date of Decision: March 15, 2017.

23 42. Result: denied without citation.

24 43. Mr. Selivanov did not file a petition for a writ of certiorari in the
25 United States Supreme Court.

27

28 ¹² On December 13, 2016, the California Court of Appeal modified its opinion
with no change in the judgment.

1 44. Apart from the instant petition, Mr. Selivanov had not filed any habeas
 2 corpus petitions in federal court.¹³

3 **D. Jurisdiction and Venue**

4 45. Mr. Selivanov is currently not in the custody of the California
 5 Department of Corrections and Rehabilitation (“CDCR”).

6 46. Upon his release from CDCR’s custody, on May 26, 2015, Mr.
 7 Selivanov was placed on Post-Release Community Supervision, pursuant to the
 8 Post-release Community Supervision Act of 2011. Cal. Pen. C. § 3450 *et seq.*

9 47. Mr. Selivanov was discharged from community supervision on May
 10 26, 2016 after a 12-month period of successful supervision where he had no returns
 11 to custody for any violation of his community supervision.

12 48. The offending ruling by the California Court of Appeal, which is the
 13 basis for claim one of this Petition, was handed down on November 17, 2016 and
 14 modified on December 13, 2016.

15 49. While Mr. Selivanov is not currently in actual custody (nor on
 16 probation or parole), he nonetheless suffers disabilities and restraints on his liberty
 17 as a result of his having been convicted of ten felonies. Chief among them is Mr.
 18 Selivanov’s inability to hold any office of honor, trust, or profit in California,
 19 pursuant to California Penal Code section 514.

20 50. These restraints will be just as real and substantial as those that were
 21 found to warrant an expansion of the availability of the writ of habeas in the past to
 22 persons not in actual custody. Mr. Selivanov will not have the right to do many
 23 things that free citizens are entitled to do, even those with felony convictions.

24
 25
 26 ¹³ On October 22, 2013, Mr. Selivanov filed a petition for a writ of habeas corpus
 27 with the California Court of Appeal, challenging the trial court’s decision not
 28 release him on bail pending appeal. On November 4, 2013, the California Court of
 Appeal summarily denied Mr. Selivanov’s petition.

1 51. Such disabilities and restraints are sufficient to give him standing to
2 challenge his convictions in federal habeas corpus regardless of whether the filing
3 of his petition occurred before or after the termination date of the challenged
4 sentence.

5 52. It is not actual physical custody during service of a sentence that gives
6 standing in habeas corpus; it is instead the restraint on liberty, whether physical or
7 of a more subtle nature. *See Glover v. State of N.C.*, 301 F. Supp. 364, 368
8 (E.D.N.C. 1969). *Brooks v. North Carolina Dept. of Correction*, 984 F.Supp. 940
9 (1997).

10 53. Mr. Selivanov currently resides in Calabasas, Los Angeles County,
11 California.

STANDARDS UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (“AEDPA”)

15 54. The Anti-Terrorism and Effective Death Penalty Act of 1996
16 (AEDPA, or the Act) generally limits a federal court's ability to grant relief on
17 claims that were adjudicated "on the merits" in state court proceedings, unless the
18 adjudication resulted in a decision that was "contrary to" or involved an
19 "unreasonable application of" clearly established federal law as determined by the
20 United States Supreme Court, or if the adjudication resulted in a decision that was
21 based on an "unreasonable determination of the facts[.]"²⁸ U.S.C. § 2254(d)(1)-(2).

22 55. Section 2254(d) is phrased in the disjunctive, meaning that a petitioner
23 overcomes this limitation on relief by satisfying either section 2254(d)(1) or (d)(2).
24 Once a petitioner satisfies this standard, his claim is reviewed *de novo*. *Nunes v.*
25 *Mueller*, 350 F.3d 1045, 1051 (9th Cir. 2003).

CLAIMS FOR RELIEF

CLAIM ONE: MR. SELIVANOV'S RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE THE CALIFORNIA COURT OF APPEAL RETROACTIVELY EXPANDED CALIFORNIA'S EMBEZZLEMENT LAW THEREBY ELIMINATING THE REQUIRED FAIR WARNING THAT A CRIMINAL STATUTE MUST PROVIDE AS TO THE CONDUCT THAT IT PROHIBITS

56. The record in this case points to uncontroverted evidence that Mr. Selivanov's challenged "embezzlements"—primarily his AMEX Card charges and the Lease/Loan transaction—were all approved by the funds' owner: the school's board of directors, or one of its members.

57. The California Court of Appeal acknowledged these approvals in its opinion. *See, e.g., People v. Selivanov*, 5 Cal. App. 5th 726, 739–40, 742–4, (Ct. App. 2016), as modified on denial of reh’g (Dec. 13, 2016), review denied (Mar. 15, 2017).

58. Despite these approvals by the funds' owner, the California Court of Appeal held that Mr. Selivanov was guilty of embezzling the school's funds because "charter schools operate under the authority not only of their own charters and governing boards but also the broader umbrella of the LAUSD Charter School Division." *People v. Selivanov*, 5 Cal. App. 5th at 751. Per the Court of Appeal's ruling, even if the owner of the funds approves an expenditure, there can still be embezzlement, and the final arbiter of these prohibited actions is, as a result, not the owner of the funds, but rather the school's authorizers, speaking through their employees. *Id.*

59. This application of the law of embezzlement is a *novel* and *retroactive* expansion of the otherwise narrow and precise definition of that law in California.

60. California Penal Code section 504, which underlined Mr. Selivanov's convictions, is "an ordinary embezzlement statute which, like several others, specifically mentions the persons who come within the fiduciary relationships." *See* 2 Witkin, Cal. Crim. Law (4th), Crimes-Property § 43 (2012).

1 61. “Fraudulent intent is an essential element of embezzlement.” *People*
 2 *v. Sisuphan*, 181 Cal. App. 4th 800, 813 (2010). “A person acts fraudulently when
 3 he or she takes undue advantage of another person or causes loss to that person by
 4 breaching a duty [of] trust or confidence.” CALCRIM 1806.

5 62. In determining whether a defendant’s intent was fraudulent at the time
 6 of the taking, the issue is whether he or she intended to use the property at issue for
 7 a purpose other than that for which the *principal* entrusted it to him or her. *Id.*; see
 8 *also People v. Hedges*, 153 Cal. App. 2d 788, 793 (1957) (“The gist of
 9 [embezzlement] is the appropriation to one’s own use of property delivered to him
 10 for devotion to a specified purpose other than his own enjoyment of it”); *People v.*
 11 *McClain*, 140 Cal. App. 2d 899, 900 (1956) (“The intent essential to embezzlement
 12 is the intent to fraudulently appropriate the property to a use and purpose other than
 13 that for which it was entrusted.”) “The offense of embezzlement contemplates a
 14 principal’s entrustment of property to an agent for certain purposes and the agent’s
 15 breach of that trust by acting outside his authority in his use of the property.”
 16 *Sisuphan*, 181 Cal. App. 4th at 813-14.

17 63. At trial, the prosecution failed to present evidence showing, or even
 18 inferring, that Mr. Selivanov used the funds at issue for a purpose other than that
 19 for which the funds’ owner (the charter school) intended. The *principal*, in other
 20 words, had no issue with the manner in which the funds were spent, as
 21 demonstrated by the specific approvals the school’s governing board gave for the
 22 actions at issue.

23 64. Nonetheless, the Court of Appeal affirmed Mr. Selivanov’s
 24 embezzlement convictions by adding an additional avenue for liability. Under the
 25 Court of Appeal’s novel construction of the embezzlement offense, a person may be
 26 guilty of embezzlement even if he or she used the property at issue for a purpose
 27 that *conforms* with the principal’s wishes, as long as a third party, identified *post-*
 28 *hoc*, disapproved of the spending.

1 65. Because the Court of Appeal created an additional avenue of
2 embezzlement liability after the fact, Mr. Selivanov was punished for conduct that
3 was not criminal under California’s embezzlement law at the time Mr. Selivanov
4 committed it.

5 66. This retroactive expansion of California’s embezzlement law
6 eliminated the required fair warning that a criminal statute must provide as to the
7 conduct that it prohibits and thus violated Mr. Selivanov’s right to due process
8 under the Fifth and Fourteenth Amendments. *Bouie v. City of Columbia*, 378 U.S.
9 347(1964); *United States v. Lanier*, 520 U. S. 259, 266 (1997).

10 67. The Court of Appeal’s ruling is squarely at odds with this basic notion
11 of fairness. Simply put: Mr. Selivanov had no opportunity to know which of his
12 “takings”—all approved by the owner of the funds—were nonetheless criminal
13 embezzlements, because they were criminalized years later, by virtue of the Court
14 of Appeal’s expansion of the offense of embezzlement. The otherwise precise law
15 of embezzlement has therefore been unforeseeably and retroactively expanded by
16 judicial construction.

17 68. “There can be no doubt that a deprivation of the right of fair warning
18 can result . . . from an unforeseeable and retroactive judicial expansion of narrow
19 and precise statutory language.” *Bouie v. City of Columbia*, 378 U.S. 347, 352
20 (1964). “[J]udicial enlargement of a criminal act by interpretation is at war with a
21 fundamental concept of the common law that crimes must be defined with
22 appropriate definiteness.” *Id.* (citing *Pierce v. United States*, 314 U.S. 306, 311
23 (1941)). “Indeed, an unforeseeable judicial enlargement of a criminal statute,
24 applied retroactively, operates precisely like an ex post facto law, such as Art. I, s
25 10, of the Constitution forbids.” *Bouie*, 378 U.S. at 353.

26 69. Penal Code 504 (like other forms of embezzlement) contemplates “a
27 principal’s entrustment of property to an agent for certain purposes and the agent’s
28

1 breach of that trust by acting outside his authority in his use of the property.”
 2 *Sisuphan*, 181 Cal. App. 4th at 813-14.

3 70. Much like in *Bouie*, section 504 of California’s Penal Code did not
 4 give Mr. Selivanov fair warning, at the time of his conduct in question, that the acts
 5 for which he now stands convicted were rendered criminal by the statute. *Id.* at
 6 355. Nowhere in Penal Code 504, or in its then-controlling judicial construction,
 7 did it indicate that a defendant could be guilty of embezzlement even when acting
 8 *inside* his authority when using the property. Nothing in the statute indicated that it
 9 also prohibited the use of property against the wishes of a yet-to-be-determined
 10 third party.

11 71. And indeed, in Mr. Selivanov’s case, the jury instructions identified
 12 *Ivy Academia* as the funds’ owner and made no mention of the LAUSD or any other
 13 party in that context. The instructions also instructed the jury that a “good faith
 14 belief in acting with authorization to use the property is a defense.” [24CT 4481
 15 (jury instructions given).]

16 72. Mr. Selivanov, therefore, did not violate the California embezzlement
 17 statute as it was written; he received authorization to use the funds in question as he
 18 did from the only entity that mattered under the law: Ivy Academia—the funds’
 19 owner. So far as the California embezzlement statute was concerned, Mr.
 20 Selivanov was given not only no “fair warning,” but no warning whatever, that his
 21 use of the funds entrusted to him by Ivy Academia would violate the embezzlement
 22 statute.

23 73. The Court of Appeal’s decision likewise violated Mr. Selivanov’s due
 24 process rights because it allowed non-principals (in this case, the LAUSD and the
 25 Los Angeles County District Attorney) to override, after the fact, the decisions of
 26 the funds’ owners.

27 74. The Court of Appeal’s ruling effectively “delegate[d] basic policy
 28 matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective

1 basis, with the attendant dangers of arbitrary and discriminatory application.”
 2 *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

3 75. Indeed, at trial, the prosecution relied upon the testimony of Ms. Delos
 4 Santos, a financial analyst at LAUSD-OIG and a CPA with little prior experience in
 5 charter school audits. To evaluate which AMEX Card purchases she deemed
 6 “disallowed,” Ms. Delos Santos came up with her own criteria: she disallowed *all*
 7 meals charged by Mr. Selivanov to the AMEX Card, unless the meal accompanied
 8 a business meeting lasting more than five hours, or unless the meal was related to a
 9 conference taking place away from Los Angeles. [10RT 3437-38.]

10 76. Ms. Delos Santos also disallowed all teacher appreciation events
 11 charged to the AMEX Card unless the event had a specifically delineated
 12 professional development component. [11RT 3659-60.]

13 77. Ms. Delos Santos could not cite to any particular rule, regulation, or
 14 statute that informed her decision to disallow, after the fact, these particular meals
 15 and teacher appreciation events (but not others).¹⁴ She equally could not explain
 16 why she picked these criteria (and not others).

17 78. By applying its post-hoc novel construction of embezzlement, the
 18 California Court of Appeal effectively endorsed Ms. Delos Santos’ arbitrary and
 19 capricious analysis of which of Mr. Selivanov’s use of funds was and was not
 20 criminal.

21 79. The California Court of Appeal’s decision was “contrary to” clearly
 22 established federal law as determined by the United States Supreme Court because
 23 in applying its new construction of the California embezzlement statute to affirm
 24 Mr. Selivanov’s convictions, the Court of Appeal has deprived Mr. Selivanov of
 25 rights guaranteed to him by the Due Process Clause.

26
 27 ¹⁴ Accordingly, it was undisputed at trial that no document existed that put Mr.
 28 Selivanov on notice as to Ms. Delos Santos’ arbitrary restrictions.

1 **CLAIM TWO: MR. SELIVANOV'S RIGHT TO A JURY TRIAL WAS VIOLATED BECAUSE**
2 **HIS CRIMINAL SENTENCE WAS INCREASED BEYOND ITS STATUTORY LIMITS BASED**
3 **ON FACTS FOUND TO BE TRUE BY THE TRIAL JUDGE AND NOT BY THE JURY BEYOND**
4 **A REASONABLE DOUBT**

5 **A. Procedural Background**

6 80. The Information in this case charged Mr. Selivanov with six counts of
7 embezzlement by a private or public officer, pursuant to California Penal Code
8 section 504. As to each of these counts, the Information added the special
allegations that “the said embezzlement and defalcation was of [the] public funds
within the meaning of [California] Penal Code section 514.”

9 81. Mr. Selivanov has never admitted these allegations, nor did he waive
10 his right to a jury trial concerning these allegations.

11 82. The prosecution never sought to have the jury make a finding on these
12 allegations, and nothing in the verdict forms refers to or answers the question of
13 whether the funds involved in the embezzlement counts were “public funds”
14 pursuant to California Penal Code section 514.

15 83. In fact, with respect to these embezzlement counts, the jury was
16 specifically instructed that the owner of the funds in question was Alternative
17 Schools, Inc., dba Ivy Academia Charter School. The jury was never instructed it
18 had to find the funds involved were “public.”

19 84. During the sentencing hearing (without any notice) the prosecution
20 asked the trial court to make a California Penal Code section 514 finding “in light
21 of them being public officials.” [22RT 10297.] The prosecution added (correctly)
22 that “that would have an impact in terms of the sentencing.” [Id.] Thereafter, the
23 trial court proceeded to sentence the defendants but made no section 514 finding.
24 Just before Mr. Selivanov was taken into custody, the prosecution again requested
25 that the court make the finding:

26 Excuse me, your honor, before the defendant leaves,
27 pursuant to penal code 514, we believe we need a finding
made by the court that this involved embezzlement of

1 public funds, because that would render the defendants
2 ineligible to hold public office.

2 [22RT 1032.]

3 85. Over the defense's objections, the trial court acquiesced to the
4 prosecution's request:

5 I do make the finding that these were public funds and
6 that he embezzled public funds, and the public funds
7 being the funds from the school, Ivy Academia, which is
8 a public school.

8 [22RT 10313.]

9 86. Mr. Selivanov moved the trial court to correct his sentence, but the
10 trial court refused to strike its section 514 findings.

11 **B. Argument**

12 87. The trial court's section 514 finding was contrary to clearly established
13 federal law as determined by the United States Supreme Court.

14 88. The trial court's section 514 finding violated *Apprendi v. New Jersey*,
15 530 U.S. 466 (2000) (*Apprendi*) and *Alleyne v. United States*, 570 U.S. 99 (2013)
16 (*Alleyne*), which require any fact that increases the statutory maximum (*Apprendi*)
17 or mandatory minimum (*Alleyne*) punishment to be found by a jury beyond a
18 reasonable doubt.

19 89. By making the contested section 514 finding, the trial court
20 impermissibly increased Mr. Selivanov's maximum and minimum penalties in three
21 distinct ways: (1) it removed California Penal Code section 504 from "wobbler"
22 status; (2) it imposed mandatory state prison incarceration where probation is
23 denied; and (3) it barred Mr. Selivanov from holding public office.

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1 **1. The trial court's section 514 finding increased Mr.
2 Selivanov's punishment by removing the offenses from
3 "wobbler" status**

4 90. In California, embezzlement of money or property valued at more than
5 \$950, is, like its grand theft counterpart, a "wobbler"—a crime that "in the trial
6 court's discretion, may be sentenced alternately as [a] felon[y] or misdemeanor[]."
7 *People v. Superior Court (Alvarez)*, 14 Cal.4th 968, 974 (1997); *see also People v.*
8 *Stanfill*, 76 Cal. App. 4th 1137, 1144-1145 (1999). California Penal Code section
9 489(c) is the source of this discretion. It provides that grand theft (with narrow
10 exceptions not applicable here) is punishable "by imprisonment in a county jail not
11 exceeding one year *or* pursuant to subdivision (h) of Section 1170." (emphasis
added)

12 91. Under this *wobbler* scheme, at sentencing, the trial court had the
13 discretion to choose whether Mr. Selivanov should be subject to felony or
14 misdemeanor punishment. As a result, the punishment *floor* Mr. Selivanov faced
15 was that provided in section 489 (c), "imprisonment in a county jail not exceeding
16 one year." Even if it was unlikely that the trial court would have exercised its
17 discretion to sentence Mr. Selivanov as if he were convicted for misdemeanor
18 embezzlement, it would have had that option.

19 92. After the "public funds" finding was made, however, the trial court
20 lost its discretion to sentence defendants to a misdemeanor punishment. Under
21 section 514, the embezzlement of public funds "is a felony, and is punishable by
22 imprisonment in the state prison." Cal. Pen. C. § 514. The minimum punishment to
23 which Mr. Selivanov was subject accordingly rose to the low term of the felony
24 triad—16 months—based on the trial court's finding.

25 93. In *Alleyne*, the Supreme Court determined that "facts that increase the
26 mandatory *minimum* sentence are [] elements [of the offense] and must be
27 submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at
28 108 (emphasis added). "The essential point is that the aggravating fact produced a

1 higher range, which, in turn, conclusively indicates that the fact is an element of a
 2 distinct and aggravated crime. It must, therefore, be submitted to the jury and
 3 found beyond a reasonable doubt.” *Id.* at 116.

4 94. The section 514 “public funds” finding had the effect of eliminating
 5 the trial court’s discretion to sentence Mr. Selivanov to a *lower*, misdemeanor
 6 sentence, to be served in county jail. In other words, while Mr. Selivanov was
 7 subject to felony punishment with or without the “public funds” finding, with the
 8 finding, he was subject *only* to felony punishment. Under *Alleyne*, the finding
 9 should have therefore been made by the jury, not by the trial court.

10 **2. The trial court’s section 514 finding increased Mr.
 11 Selivanov’s punishment because it imposed mandatory state
 12 prison incarceration**

13 95. Because of the trial court’s section 514 “public funds” finding, Mr.
 14 Selivanov was *required* to serve his custodial time in state prison, as opposed to the
 15 local custody that is required for most offenders convicted of embezzlement under
 16 Realignment.¹⁵

17 96. Time served locally is less punitive than time served in state prison.

18 97. By making the section 514 “public funds” finding, the trial court took
 19 the option of local custody away without a jury finding, thus increasing—in
 20 violation of *Apprendi*—the punishment available for embezzlement pursuant to
 21 Penal Code section 504.

22 98. Moreover, under Realignment, the trial court had discretion to suspend
 23 execution of a portion of Mr. Selivanov’s county jail term and place him on
 24

25 ¹⁵ See Couzens & Bigelow, Felony Sentencing After Realignment (July 2013 rev.)
 26 at 102, which lists, in Appendix I, “504/514” as requiring a state prison sentence,
 27 compared with section 489(b), listed therein as punishable by local custody under
 28 section 1170, subdivision (h). Available at
www.courts.ca.gov/partners/documents/felony_sentencing.pdf

1 mandatory supervision, which could have significantly reduced the period of actual
2 custody (often called “split” or “blended” sentences). *See Cal. Pen. C. § 1170*
3 (h)(5)(B); *People v. Wilcox*, 217 Cal. App. 4th 618, 621 (2013). Again, this option
4 was removed once the trial court made its section 514 finding because the
5 embezzlement convictions were no longer subject to sentencing under Penal Code
6 section 1170(h).

7 **3. The trial court’s section 514 finding increased Mr.**
8 **Selivanov’s punishment because it barred Mr. Selivanov**
9 **from holding public office**

10 99. The Court’s “public funds” finding under Penal Code section 514 also
11 violated *Apprendi* because it supported a disqualification from holding public
12 office—an added penalty not available for simple embezzlement convictions under
13 Penal Code § 504 alone.

14 100. The lifetime ban on holding public office stemming from a section 514
15 finding is punitive. It therefore provides an additional basis for finding that Mr.
16 Selivanov had a right to a jury trial on the truth of the “public funds” allegation
17 under the federal Constitution.

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PRAYER FOR RELIEF

Mr. Selivanov therefore requests that this Court:

1. Issue the writ of habeas corpus, vacate Mr. Selivanov's convictions and sentence, and grant any additional relief appropriate in the interest of justice
 2. In the alternative, conduct an evidentiary hearing at which proof may be offered concerning all of the allegations in the Petition.

Dated: June 12, 2018

Respectfully submitted,

KENDALL, BRILL & KELLY, LLP

By: /s/Jeffrey H. Rutherford
Jeffrey H. Rutherford

CROWELL & MORING LLP

/s/Nimrod Haim Aviad
Nimrod Haim Aviad

Attorneys for Petitioner,
YEVGENY (EUGENE) SELIVANOV

VERIFICATION

I, Yevgeny Selivanov, declare and state as follows:

1. I am the petitioner to whom the foregoing Petition for Writ of Habeas Corpus relates.

2. I have read the foregoing petition for writ of habeas corpus. I affirm that all the matters alleged here are true of my own personal knowledge or are supported by the record in my trial and direct appeal, and by the attached exhibits.

I verify under penalty of perjury that the foregoing is true and correct.

Executed on June 10 2018, at Calabasas, California.

By:

Yevgeny (Eugene) Selivanov